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Before the

Federal Communications Commission

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
QUALCOMM INCORPORATED	)	DA 00-219
	)	
Petition for Declaratory Ruling Seeking 700 MHz Band License Pursuant to Ruling of U.S. Court of Appeals	)	
	)	
Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 99-168

To: The Commission

OPPOSITION OF U S WEST WIRELESS, LLC

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SUMMARY

U S WEST Wireless, LLC ("U S WEST") opposes the Petition for Declaratory Ruling ("Petition") submitted by QUALCOMM Incorporated ("QUALCOMM") seeking a ruling that a 20 MHz Economic Area Grouping ("EAG") license at 752-762 MHz and 782-792 MHz (the "700 MHz D Block") is "suitable spectrum" and will satisfy the Court's mandate in *QUALCOMM v. FCC*.

The Commission lacks authority to grant 700 MHz D Block spectrum to QUALCOMM. In the 1997 Budget Act and 1999 Consolidated Appropriations Act, Congress expressly required that this spectrum be licensed pursuant to competitive bidding. To the extent that the Commission ordinarily has discretion whether to license spectrum by competitive bidding, Congress has removed this discretion for the 700 MHz band and the Commission does not have jurisdiction to grant the QUALCOMM Petition.

Grant of the Petition would also unnecessarily pit the Commission and Congress against the Court and raise significant separation of powers issues. The Court did not mandate that 700 MHz spectrum be granted to QUALCOMM. Moreover, Section 402(h) does not supersede the Commission's obligation to license spectrum in the public interest as determined by Congress. The Commission retains discretion to properly effectuate the Court mandate and, in this regard, granting a license from broadband PCS spectrum slated for reauction is consistent with the Court's mandate and the Commission's public interest obligations.

Even assuming *arguendo* that the Commission has authority to license this spectrum to QUALCOMM, awarding a 700 MHz D Block license for the Southeast EAG covering multiple MTAs and a population significantly larger than the Miami MTA, does not represent "suitable spectrum" commensurate with QUALCOMM's original preference request. Such an award is thus inconsistent with the Court's mandate, as well as the Commission's pioneer's preference and broadband PCS rules, and would grant QUALCOMM an unwarranted windfall. QUALCOMM's valuation of the 700 MHz spectrum is flawed and exceeds the Court's mandate. Grant of the Petition will also disrupt the Commission's licensing scheme for the 700 MHz spectrum and preclude bidders from pursuing a nationwide aggregation strategy, thus adversely affecting the value of this spectrum and potential service offerings. The Commission should deny the Petition and use other means to satisfy its obligations vis-a-vis QUALCOMM, namely by assigning suitable broadband PCS spectrum slated for reauction.

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To: The Commission

OPPOSITION OF U S WEST WIRELESS, LLC

U S WEST Wireless, LLC ("U S WEST") hereby opposes the Petition for Declaratory Ruling submitted by QUALCOMM Incorporated ("QUALCOMM") seeking a declaratory ruling that a 20 MHz Economic Area Grouping ("EAG") license at 752-762 MHz and 782-792 MHz (hereinafter the "700 MHz D Block")[1] is "suitable spectrum" and will satisfy the Court's mandate in *QUALCOMM v. FCC*.[2] As demonstrated below, the Commission lacks authority to grant 700 MHz D Block spectrum to QUALCOMM. Further, even assuming *arguendo* that the Commission has such authority, awarding a 700 MHz D Block license for the

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[1] QUALCOMM Incorporated, Petition for Declaratory Ruling filed in WT Docket No. 99-168, January 28, 2000 (the "Petition"); Public Notice, *Wireless Telecommunications Bureau Seeks Comment on QUALCOMM Incorporated's Petition for Declaratory Ruling Seeking 700 MHz Band License Pursuant to Ruling of U.S. Circuit Court of Appeals*, DA 00-219 (Wireless Telecom. Bur. Feb. 4, 2000) ("Public Notice"), *filing deadline extended*, DA 00-273 (Feb. 11, 2000).

[2] *QUALCOMM v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999).

Southeast EAG ("EAG 3") covering multiple MTAs does not represent "suitable spectrum" commensurate with QUALCOMM's original preference request or the Court's mandate and such an award would unnecessarily create a conflict between Congress and the courts. Grant of the Petition will also disrupt and undermine the Commission's licensing scheme for the 700 MHz spectrum and preclude bidders from pursuing a nationwide aggregation strategy, thus adversely affecting potential bidders' business plans and the value of this spectrum. For the reasons discussed herein, the Commission should deny the Petition and use other means to satisfy its obligations vis-a-vis QUALCOMM.

BACKGROUND/INTRODUCTION

When the Commission adopted rules for the now-terminated pioneer's preference program, it permitted applicants "to select the one area of licensing that it desires to serve" based on how the Commission "defines the area of operation under its rules; *e.g.*, city or region."[3] The Commission determined that a license "for more than one service area would usually be unnecessary" and a single license "will generally be sufficient . . . ."[4] In accordance with the rules, QUALCOMM's original pioneer's preference application sought a broadband PCS license "for the Southern Florida area, or whatever region the Commission defines to include Miami and

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[3] *See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order*, 6 FCC Rcd. 3488, 3494-95 ¶ 53 (1991) ("*Pioneer's Preference Report and Order*"). As an example, the Commission stated that if it "decide[d] that a service should be licensed on a Metropolitan Statistical Area (MSA) basis, the pioneer's preference, if awarded, would apply to the MSA designated by the innovator." *Id.*

[4] *Id.* at 3495 ¶ 54.

surrounding communities."[5] The QUALCOMM preference request predated establishment of spectrum blocks and license areas for broadband PCS service.[6]

The Commission initially denied QUALCOMM's request, instead granting pioneer's preference awards to three other entities.[7] The Commission awarded 30 MHz blocks for MTA service areas to each of the three preference awardees consistent with the broadband PCS rules, as the Commission was persuaded that such licenses would "best serve customers," have "economic integrity," and help avoid congested frequencies.[8] The Commission determined that, while it had authority to subject these licenses to competitive bidding pursuant to the authority granted by Congress in 1993, "to do so would be inequitable."[9]

QUALCOMM successfully appealed the Commission's denial of its pioneer's preference application to the United States Court of Appeals for the District of Columbia.

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[5] *QUALCOMM Request for Pioneer's Preference*, GEN Docket No. 90-314, May 4, 1992 at 2.

[6] 47 C.F.R. § 24.229.

[7] American Personal Communications ("APC") for the Baltimore-Washington MTA; Cox Communications ("Cox") for the San Diego MTA; and Omnipoint for the New York City MTA were each awarded licenses. *Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report and Order*, 9 FCC Rcd. 1337, 1339-1348 (1994) ("*Third Report and Order*").

[8] *Id.* at 1348-49, ¶¶ 75-80.

[9] *Review of the Pioneer's Preference Rules, First Report and Order*, 9 FCC Rcd. 605, 610 ¶ 9 (1994). The Commission did not address the statutory basis for its decision. In the preceding *Notice of Proposed Rulemaking*, however, it posited that its obligation under Section 309(j)(6)(G) to not construe its Section 309(j)(1) authority "to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology," as well as the Commission's determination that "a pioneer's preference application will be the sole application acceptable for filing for the specific license at issue" and would therefore not be subject to mutual exclusivity, provided sufficient statutory authority to grant the three applications. *Review of the Pioneer's Preference Rules, Notice of Proposed Rulemaking*, 8 FCC Rcd. 7692, 7693 ¶¶ 9-10 (1993).

Circuit.[10] Thereafter, while the Commission was considering QUALCOMM's preference application again on remand, Congress enacted legislation expediting the elimination of the pioneer's preference program.[11] The Commission then dismissed the QUALCOMM request; this latter action was overturned by the Court on further appeal by QUALCOMM.[12]

In its order overturning the dismissal of the QUALCOMM pioneer's preference request, the Court directed the Commission "'forthwith' to grant QUALCOMM a pioneer's preference and to identify and award *an appropriate license* to it, *commensurate with the spectrum it had requested in its application*" and "to take prompt action *to identify a suitable spectrum* and award QUALCOMM the license for it."[13] While the Court did not define what would constitute "suitable spectrum," it did specifically direct the Commission to make reference to the spectrum QUALCOMM requested in its original application.[14] QUALCOMM has since obtained its pioneer's preference award from the Commission, but a license has not yet been issued.[15]

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[10] *See Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997).

[11] Balanced Budget Act of 1997, Pub. L. 105-33, § 3002(a), 111 Stat. 259 (1997) ("1997 Act") (codified at 47 U.S.C. § 309(j)(13)(F)).

[12] *Dismissal of All Pending Pioneer's Preference Requests*, 12 FCC Rcd. 14006 (1997), *rev'd and remanded, QUALCOMM, Inc. v. FCC*, 181 F.3d 1370.

[13] *QUALCOMM Inc. v. FCC*, 181 F.3d at 1376, 1381 (emphasis added).

[14] *See id.* at 1376; *see also id.* at 1372 (describing original 2 GHz PCS Miami MTA license application), and at 1376 (noting that "QUALCOMM repeatedly indicated its willingness to accept relief comparable *to the original license sought in its preference application*" (emphasis added)). Indeed, as discussed herein, QUALCOMM advised the Court and the Commission of its willingness to accept alternative PCS spectrum in satisfaction of its preference award.

[15] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Order*, 14 FCC Rcd. 13678 (1999).

During the pendency of the QUALCOMM proceeding, Congress enacted statutory provisions specifically governing the licensing of the 700 MHz spectrum at issue here. The 1997 Act requires that the "36 megahertz of th[is] spectrum for commercial use [] be assigned *by competitive bidding* pursuant to Section 309(j)."[16] The Consolidated Appropriations Act enacted in 1999 provides further that upon enactment the Commission "shall initiate the *competitive bidding process* previously *required* under section 337(b)(2) . . . ."[17] The 1999 Act further provides that the Commission "shall conduct *the competitive bidding process* . . . in a manner that ensures that all proceeds of such bidding are deposited . . . not later than September 2000."[18] To implement these statutorily-imposed competitive bidding obligations, the Commission has adopted service rules governing the licensing of this spectrum, and scheduled an auction to commence May 10, 2000.[19]

QUALCOMM now "requests leave to withdraw its pending preference request for the [Miami MTA] and substitute[] Block D of EAG 3 therefor."[20] QUALCOMM further "requests that the Commission declare that the EAG 3 Block D license is the 'suitable spectrum' required to be awarded to QUALCOMM and that the Commission make such award

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16 47 U.S.C. § 337(a)(2) (emphasis added).

17 Consolidated Appropriations Act, Pub. L. No. 106-113, § 213 (1999) (printed at 145 Cong. Rec. H12493 (Nov. 17, 1999)) ("1999 Act") (emphasis added).

18 *Id.* (emphasis added).

19 *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, First Report and Order*, WT Docket No. 99-168, FCC 00-5 (released Jan. 7, 2000), 65 Fed. Reg. 3139 (Jan. 20, 2000) ("*700 MHz First Report and Order*"); Public Notice, *Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for May 10, 2000*, DA 00-43 (rel. Jan. 10, 2000), 65 Fed. Reg. 2956 (Jan. 19, 2000).

20 Petition at i, 17.

'forthwith.'"[21] Block D of EAG 3 represents a 20 MHz license covering the Southeast region of the United States, the Eastern Gulf of Mexico region, and Puerto Rico and the U.S. Virgin Islands. By Public Notice dated February 4, 2000, the Bureau seeks comment "on all aspects of" the Petition.[22]

U S WEST understands and is sympathetic to QUALCOMM's predicament, but urges the Commission to deny the Petition. Grant of the Petition would undermine Congress's expressed intent for this spectrum as manifest in the 1997 Act and 1999 Act and would unnecessarily put the Court's mandate in conflict with the Commission's congressionally-mandated public interest obligations. Even assuming *arguendo* that the Commission is not prohibited outright from awarding a pioneer's preference license to QUALCOMM from the 700 MHz spectrum, QUALCOMM's request exceeds the scope and terms of the Court's mandate and, if granted in its current form, would result in an unjustifiable windfall. Moreover, grant of the request would disrupt and devalue the 700 MHz spectrum auction. While the Court determined that QUALCOMM was denied benefits to which it was entitled under the pioneer's

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[21] *Id.* at 17.

[22] Public Notice at 1. It appears that QUALCOMM's Petition is procedurally infirm. Unless the Commission timely acts on its own motion to amend the rules currently in effect, a waiver and/or reconsideration of the 700 MHz rules will be necessary to award the relief requested. Specifically, the rules require that this spectrum be assigned by competitive bidding, and eligibility is largely unrestricted; a waiver of these rules would plainly be required. *See* 47 C.F.R. §§ 27.12, 27.501; *see also id.* §§ 1.2102, 1.2105. A Section 1.2 petition for declaratory ruling is not sufficient for obtaining such relief. U S WEST further notes that the Commission delegated to the Bureau limited authority "to implement and modify auction procedures . . ., including the general design and timing of the auction; the manner of submitting and withdrawing bids; the amount of any minimum opening bids and bid increments; activity and stopping rules; and application and payment requirements . . . ." *700 MHz First Report and Order* ¶ 149. Thus, it would appear that the Bureau lacks the authority to grant QUALCOMM the relief it requests.

preference program, the company necessarily remains subject to the program's limitations as well. There is no basis for the requested grant of a 700 MHz D Block license.

DISCUSSION

I. CONGRESS HAS REQUIRED THAT 700 MHz SPECTRUM LICENSES BE ASSIGNED BY COMPETITIVE BIDDING

Under the Court's QUALCOMM mandate, the Commission is required to "identify . . . an appropriate license" and "suitable spectrum" for QUALCOMM.[23] However, the 700 MHz spectrum sought by QUALCOMM is neither "appropriate" nor "suitable" and the Commission is without jurisdiction to grant the Petition. With respect to the 700 MHz band of spectrum, Congress has directly spoken as to what method of assigning licenses will best serve the public interest. The Court's decision does not, by its terms, purport to trump the Commission's existing statutory obligations to auction spectrum in the 700 MHz band, and there is no need for this conflict to arise. The Court's mandate can be satisfied by the award of other suitable spectrum, but not the 700 MHz band spectrum, where Congress has given the Commission precise instructions as to how the spectrum licenses are to be allocated.

While Section 309(j) of the Communications Act ordinarily requires that wireless licenses be awarded via competitive bidding, it is not preordained that all licenses are to be auctioned. Thus, under ordinary circumstances, the Commission would have some discretion whether to accept mutually exclusive applications and, therefore, it is not a foregone conclusion that licenses will be awarded by competitive bidding.[24]

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[23] *See QUALCOMM v. FCC*, 181 F.3d at 1376, 1381.

[24] The statute provides that, except for certain classes of licenses:

(continued...)

Congress left no doubt or discretion in the 1997 Act and the 1999 Act, however, as to whether the 700 MHz licenses are to be licensed via competitive bidding. As discussed above, the 700 MHz spectrum is "to be assigned by competitive bidding pursuant to Section 309(j)."[25] While the Commission determined in 1994 that it had discretion to license the pioneer's preference licenses for *broadband PCS* spectrum via means other than competitive bidding,[26] the Commission's discretion to license spectrum generally by means other than competitive bidding was significantly curtailed in the 1997 Act. Specifically, section 309(j)(1) formerly provided that the Commission "*shall have the authority . . . to grant* [mutually exclusive applications for a] license . . . through the use of a system of competitive bidding."[27] It now provides for such licenses that "the Commission *shall grant* the license or permit to a

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[24] (...continued)

> *If, consistent with the obligations described in paragraph (6)(E)*, mutually exclusive applications are accepted for any initial license or construction permit, then . . . the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

47 U.S.C. § 309(j)(1) (emphasis added). Section 309(j)(6)(E), in turn, provides that "[n]othing in this subsection, or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." *Id.* § 309(j)(6)(E).

[25] *Id.* § 337(a)(2); *see also* H. Conf. Rep. No. 105-217, at 579 (1997); H. Rep. No. 105-249, at (1997); 143 Cong. Rec. H4419 (June 25, 1997); 143 Cong. Rec. S6310 (June 25, 1997).

[26] *See supra note* 9. Indeed, Congress in 1993 had expressly stated its intent *not* to affect pioneer's preference awards. *See Review of the Pioneer's Preference Rules NPRM*, 8 FCC Rcd. at 7693 ¶ 9 (citing H.R. Rep. No. 103-213, at 485 (1993)).

[27] 47 U.S.C. § 309(j)(1) (1994) (emphasis added).

qualified applicant through a system of competitive bidding."[28] In addition, unlike broadband PCS, the method for licensing the 700 MHz spectrum -- through competitive bidding -- was specifically dictated by Congress in the 1997 Act and 1999 Act, and thus there is no basis for the 700 MHz spectrum license grant sought by QUALCOMM.

II. THE COMMISSION SHOULD NOT EFFECTUATE THE COURT'S MANDATE IN A MANNER THAT RAISES SERIOUS CONSTITUTIONAL QUESTIONS

Grant of QUALCOMM's request would irreconcilably -- and unnecessarily -- bring the Commission's statutory obligations under Section 402(h) into conflict with its public interest obligations as determined by Congress. Furthermore, and as a related matter, grant of the Petition would unnecessarily pit the Commission and Congress against the Court, undermining the separation of powers between the branches of government. The Commission should avoid this result by denying QUALCOMM's Petition.

To grant QUALCOMM's request for virtually *any* license for suitable spectrum, the Commission would need to find a way to avoid mutual exclusivity consistent with its public interest obligations.[29] As discussed above, however, any discretion the Commission may have had under Section 309(j) to assign the commercial 700 MHz licenses by methods *other* than competitive bidding was eliminated under 1997 Act and 1999 Act. Congress has foreclosed the availability of this option with respect the 700 MHz spectrum, and while the Commission must grant QUALCOMM a license, it *also* must follow its own statutory obligations in licensing this

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[28] *Id.* § 309(j)(1) (1999) (emphasis added).

[29] *Id.* § 309(j)(6)(E).

spectrum.[30] As discussed below, there is currently no conflict between the Commission's Section 402(h) and 700 MHz competitive bidding obligations, and the Commission should not create one by granting the Petition.[31]

In addition to its obligations under Section 402(h) to implement the Court's mandate "forthwith," the Commission also must comply with its public interest obligations as determined by Congress.[32] Granting QUALCOMM's request would unnecessarily put the Court's mandate and the Commission's Section 402(h) obligations in direct conflict with those public interest obligations. Because the Court has not mandated that the 700 MHz spectrum be awarded to QUALCOMM, it is clear that the Commission retains discretion as to which

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[30] *See NLRB v. Food Stores Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974) ("an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after error has been corrected, from enforcing the legislative policy committed to its charge . . . . Application of that general principle . . . best respects the congressional scheme investing the [agency] and not the courts with broad powers to fashion remedies that will effectuate [federal] policy"); *Lamprecht v. FCC*, 958 F.2d 382, 398 (D.C. Cir. 1992) (declining to require license award as remedy); *see also FPC v. Idaho Power Co.*, 344 U.S. 17, 20, *reh'g denied*, 344 U.S. 910 (1952) (court of appeals "usurped an administrative function" by imposing a license-specific remedy); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1059 (D.C. Cir. 1989), *cert denied*, 498 U.S. 817 (1990) ("even a 'deplorable' delay [in implementing decision] does not justify interference with the Board's broad remedial powers . . .", citing *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969)).

[31] It is a tenet of statutory construction that a statute's provisions should be read to be consistent with one another. *See United States v. Alaska*, 521 U.S. 1 (1997); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995).

[32] *See* 47 U.S.C. § 402(h) ("In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to renew such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 291 (D.C. Cir. 1971) ("it is our function as an appellate court -- exercising both supervisory power and responsibility of restraint -- to consider what lies within the agency's jurisdiction, *and to avoid interference with the public interest as defined by Congress*") (citing *Pottsville Bdcast. Co. v. FCC*, 309 U.S. 134, 141, 145-46 (1940) (emphasis added)).

spectrum is appropriate for QUALCOMM and can avoid the conflict posed by QUALCOMM's Petition.[33] Indeed, as discussed below, the Commission is planning to reassign broadband PCS spectrum licenses that have been reclaimed from defaulting licenses.[34] Since the Commission is in a position to identify and award broadband PCS spectrum "commensurate with the spectrum [QUALCOMM] had requested," QUALCOMM's invitation into a potential constitutional quagmire seems particularly ill-advised.[35]

Given the serious constitutional issues raised by Congress's delegation of competitive bidding authority to the Commission and its precise instructions for the 700 MHz spectrum, the Commission should heed the judiciary's admonition to agencies to avoid interpretations of its statutory obligations that raise constitutional problems.[36] In this regard,

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[33] Indeed, the suitability of a particular spectrum band for a particular technology is the very type of technical issue requiring judicial deference to an agency's expertise. *See Access Telecommunications, Debtor-In-Possession v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 609 (8th Cir.), *cert denied*, 525 U.S. 962 (1998) ("[t]he FCC has far more expertise than the courts on matters such as circuit designs, signal transmissions, noise attenuation, and echo return loss"); *Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998) (where Commission "must make judgments about future market behavior with respect to a brand-new technology, certainty is impossible [and t]he Commission must rely (within the limits of reason and rationality) on its expertise"); *see also Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963) (Commission jurisdiction "over technical matters" associated with the transmission of radio signals "is clearly exclusive").

[34] *See* Public Notice, *Auction of C and F Block Broadband PCS Licenses,* DA 00-49 (rel. Jan. 12, 2000) ("Reauction Public Notice").

[35] *See infra* notes 41-43 and accompanying text.

[36] *See American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034-1038, *reh'g denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *cert pending* (agency should interpret statutory language to avoid constitutional problems); *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) (supporting "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional"); *see also Jones v. United States*, 119 S.Ct 1215, 1222 (1999) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to

(continued...)

Section 402(h) has never been interpreted to supersede the Commission's other statutory public interest obligations under the Communications Act.[37] Thus, the Commission's obligation to effectuate the Court's mandate should be interpreted so as to avoid "grave and doubtful constitutional questions," and QUALCOMM's Petition should be denied.

III. THE 20 MHz LICENSE FOR SOUTHEAST ECONOMIC AREA GROUPING 3 IS NOT "SUITABLE SPECTRUM' FOR QUALCOMM'S PREFERENCE GRANT

As noted above, the Court has ordered that the Commission award QUALCOMM a license "commensurate with the spectrum it had requested in its application."[38] While QUALCOMM now seeks a ruling that a 700 MHz D Block license conforms to the Court's order, its original pioneer's preference request was for the "Southern Florida" area later designated by the Commission as an MTA license for Miami-Ft. Lauderdale.[39] Rather than identify a license comparable to its original application, QUALCOMM seeks now to amend its application to correspond to the frequency blocks and service areas of the Part 27 service rules for 700 MHz licenses. Even assuming *arguendo* that the Commission is not statutorily barred from granting QUALCOMM's request, and that grant of the request is not constitutionally questionable, the Court's mandate does not entitle QUALCOMM to the relief it requests.

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[36] (...continued)
adopt the latter"); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 440 (5th Cir. 1999), *cert pending* ("we construe the [Communications Act] narrowly to avoid raising these constitutional problems").

[37] *See Greater Boston*, 463 F.2d at 291.

[38] *QUALCOMM v. FCC*, 181 F.3d at 1376.

[39] U S WEST notes that while QUALCOMM states that its current preference request is for the Southern Florida MTA, the original application request in fact predated the broadband PCS service rules.

A. Broadband PCS Spectrum Would Be More "Suitable" for Award to QUALCOMM and Would Be "Commensurate" with the Spectrum Originally Requested

As discussed *supra*, the Court's mandate requires that the Commission identify and award suitable spectrum to QUALCOMM commensurate with the spectrum requested in the original application. In this regard, the Court referenced QUALCOMM's willingness to accept relief "comparable to the original license sought in its preference application,"[40] namely 2 GHz broadband PCS spectrum. As such, the Court's mandate goes to the quality and amount of spectrum needed for the services QUALCOMM intends to provide. Given its favorable characteristics, the 700 MHz spectrum may be useful for mobile wireless services, but the Court also required that the Commission be guided by QUALCOMM's original pioneer's preference application which, as noted above, was for 2 GHz broadband PCS spectrum.

It is clear, therefore, that an award of broadband PCS spectrum for a service area comparable to the Miami MTA *would* comply with the Court's mandate. In this regard, and in light of recent events, the possibility of 2 GHz broadband PCS spectrum becoming available for reauction in the near future is not as "unrealistic" as QUALCOMM indicates in its Petition.[41] The Commission is proceeding with preparations for reauction of this spectrum and recently was given express authority by the Second Circuit to proceed with the steps necessary to reauction C Block PCS spectrum licensed to NextWave and others.[42] There are licenses for a number of sizeable markets currently slated for reauction by the Commission in July 2000, including 30

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[40] *QUALCOMM v. FCC*, 181 F.3d at 1376.

[41] Petition at 14.

[42] *See NextWave Personal Communications, Inc. v. FCC*, No. 99-5063 (2d Cir. Order filed Feb. 10, 2000).

MHz licenses for the New York, Los Angeles, Boston, Cleveland, Houston and Washington DC BTA markets.[43] Granting a broadband PCS license (or a number of licenses which in the aggregate cover a population commensurate with the Miami MTA) to QUALCOMM would clearly comport with the original preference application -- and with the Court's mandate -- and would not raise the serious problems posed by QUALCOMM's request for 700 MHz spectrum. Indeed, as discussed below, QUALCOMM previously advised the Commission and the Court of its willingness to accept the Phoenix *BTA* broadband PCS license and perhaps other BTA licenses in satisfaction of its preference award.

B. The Miami MTA Broadband PCS License is not Comparable to the 700 MHz Block D EAG 3 License

As QUALCOMM states, "[t]he touchstone . . . for determining whether spectrum is 'suitable' *is the original request for the Miami license.*"[44] QUALCOMM asserts in the following sentence that "[t]o satisfy the Court's mandate, the Commission must first consider *the value* and characteristics of the Miami MTA in order to find a substitute that is 'commensurate' and 'comparable'."[45] Based on this standard, an appropriate substitute for the originally requested single MTA -- *according to QUALCOMM* -- is a 20 MHz block for the entire Southeast EAG. Though the Court did confirm QUALCOMM's "vested right" in the grant of a pioneer's preference along the lines requested in its original application, nowhere did it imply that QUALCOMM is entitled to a license award at any particular spectrum band, much less a

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[43] *See* Reauction Public Notice at Attachment A. U S WEST also notes that a number of BTA markets in the Miami MTA, including the Miami BTA itself, are currently the subject of the Metro PCS (formerly GWI PCS) bankruptcy proceeding.

[44] Petition at 9 (emphasis added).

[45] *Id.* (emphasis added).

license covering multiple MTAs at the 700 MHz spectrum band. Such an award would amount to a windfall and would *not* fulfill the Court's admonition to find a license "commensurate" with QUALCOMM's original request.

Again, QUALCOMM's prior advocacy undermines the validity of its request. As QUALCOMM acknowledges in its Petition, it had previously suggested to the Commission the appropriateness of the 30 MHz BTA license for Phoenix, Arizona or other BTA licenses.[46] Similarly, in a petition to deny the transfer of control of Omnipoint last fall, QUALCOMM cited to Omnipoint's 30 MHz MTA license as "ideal spectrum" for purposes of fulfilling with the Court's mandate.[47]

The Southeast EAG, however, covers all or parts of at least 12 MTAs and the Eastern Gulf of Mexico.[48] Furthermore, the population of the Southeast EAG of 42,091,111 is six-fold greater than that of the Miami MTA.[49] QUALCOMM's request is thus patently beyond the scope of its original application. Furthermore, the Commission intended that a pioneer's

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[46] *Id.* at 13-14.

[47] QUALCOMM Incorporated, Petition to Deny, File No. 000016538, filed September 17, 1999, at 2. The Commission denied QUALCOMM's Petition to Deny without addressing the appropriateness of the Omnipoint license for purposes of satisfying the Court's mandate. *See Voicestream Wireless Corporation et al., Memorandum Opinion and Order*, FCC 00-53, ¶¶ 37-44 (rel. Feb. 15, 2000).

[48] These include all or parts of the following MTAs: Miami-Ft. Lauderdale (15); Tampa-Orlando-St. Petersburg (13); Jacksonville (37); Atlanta (11); New Orleans (17); Memphis-Jackson (28); Birmingham (29); Nashville (43); Little Rock (40); Dallas-Ft. Worth (7); St. Louis (19); and Puerto Rico (25).

[49] *See* Petition at 11, Attachment at Exhibit A. Indeed, PricewaterhouseCoopers used the Chicago, Detroit and Dallas *BTAs* for purposes of valuing the Miami MTA. Petition, Attachment at 35.

licensed service area would be based on the service for which it received its license.[50] QUALCOMM's original license was for PCS services and, thus, at the greatest was limited to a single MTA service area.[51] The Commission also determined "that granting a preference for more than one service area would [not] usually be necessary to accomplish the purpose of adopting a pioneer's preference."[52] QUALCOMM's request would contravene this limitation by aggregating all or part of multiple MTAs, and the Commission should not allow QUALCOMM to unfairly "bootstrap" its original PCS-based application to the Part 27 rules for 700 MHz services.

C. QUALCOMM's Valuation of the Southeast EAG is Unrelated and Irrelevant to the Commission's Obligations to Grant An Appropriate License to QUALCOMM

QUALCOMM would now have the Commission disregard the limited geographic scope of the license requested by virtue of its application, the broadband PCS service area rules governing that application, and the limits cited in the Court's mandate. In fact, nowhere was the "value" of the license an issue in QUALCOMM's original application and QUALCOMM has no vested right to a particular monetary value license *per se* -- only to a license for spectrum "commensurate with the spectrum [QUALCOMM] had requested in its application."[53] Indeed, the *absence* of any license valuation was a notable aspect of the program at the time the Commission awarded the other pioneer's preference awards. It was only after Congress

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[50] The Commission held that "[t]he area selected will depend on how the Commission report and order defines the area of operation under its rules; e.g., city of region." *Pioneer's Preference Report and Order*, 6 FCC Rcd. at 3494-95 ¶ 53.

[51] *See* 47 C.F.R. § 24.202.

[52] *Pioneer's Preference Report and Order*, 6 FCC Rcd. at 3495 ¶ 54.

[53] *QUALCOMM v. FCC* 181 F.3d at 1376.

amended Section 309(j) in 1994 that "value" became a statutory issue at all for pioneer's preference licenses.

Again, the *QUALCOMM* court did not tie the appropriateness of the license or the suitability of the spectrum to a particular market value. Rather, the Court discussed QUALCOMM's "vested right" in the context of its *initial application* for a "Southern Florida area" license which it submitted pursuant to the pioneer's preference rules in effect at the time the application was filed.[54] These rules expressly required applicants to designate a limited service area which, consistent with the Commission's broadband PCS rules, was ultimately allocated on an MTA basis.[55]

Notwithstanding this infirmity with its valuation methodology and approach, QUALCOMM seeks to support its Petition with a study from PricewaterhouseCoopers LLP ("PWC") that purports to estimate the present value of a broadband PCS license for the Miami MTA awarded in 1994 at $186,000,000. A number of the assumptions in the PWC study indicate that it is of limited utility. First, the valuation was based on historical data from current PCS licensees providing primarily voice-based PCS services in competition with incumbent cellular carriers. QUALCOMM, in contrast, states that it intends to provide data-based services with, it hopes, a significant time-to-market advantage over other carriers.

Also, other than the original winning bid prices for the Miami MTA market, the PWC valuation includes only certain publicly-traded broadband PCS companies, only one of which -- Sprint PCS -- is a licensee for the Miami MTA. Data regarding other relevant companies such as PrimeCo Personal Communications, the other 30 MHz broadband PCS

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[54] *See Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d at 178-180.

[55] *See* 47 C.F.R. § 24.202.

licensee for the Miami MTA, is not included. Also, PWC relies heavily on data relating to GSM-based carriers Aerial, Omnipoint and VoiceStream; data regarding CDMA and TDMA carriers -- the fastest-growing technologies -- is not included, even though licenses for some of these carriers, including Sprint PCS and PrimeCo, are currently the subject of acquisitions with, respectively, MCI WorldCom and Bell Atlantic.

In addition to these flaws in the PWC estimate of the "value" of a 30 MHz Miami MTA license, the validity of QUALCOMM's estimate of the "value" of the 20 MHz EAG 3 license is also questionable. QUALCOMM bases its valuation of the 700 MHz spectrum not on the PWC analysis, but that of the Congressional Budget Office. These projections, which are used in the appropriations and budget process by Congress and for "scoring" purposes, are at best estimates as to auction revenue and historically have proven to have little relationship to actual auction values.[56] Further, these estimates are *not* meant to represent fair market valuation of spectrum in any formal sense.[57]

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[56] *See FCC Report to Congress on Spectrum Auctions*, WT Docket No. 97-150, 13 FCC Rcd. 9601, 9637 (1997) ("*Auctions Report*").

[57] *See* Congressional Budget Office, *Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management,* at 17 (April 1997) ("bidders characteristically do not disclose their true valuation for the licenses they win"). As CBO explains further:

> Estimating the receipts generated by FCC auctions has proved to be a difficult task. CBO, the Office of Management and Budget, and the budget committees of the Congress all dramatically underestimated the receipts that the FCC raised under the auction authority granted by the Omnibus Budget Reconciliation Act of 1993. The results of recent auctions provide a good deal more evidence than was previously available about spectrum receipts; nonetheless, the future course of regulation, technology, and investors' perceptions of market opportunities remain highly uncertain.

Id. at 32-33. In contrast, the WCS auction "raised far less than was 'scored' for budget purposes." *Auctions Report*, 13 FCC Rcd. at 9637.

As a threshold matter, U S WEST notes that the more recent CBO valuation of the spectrum is $2.6 billion, not $2.1 billion.[58] More fundamentally, however, the value of the spectrum is irrelevant to the Commission's obligation to identify an appropriate license and suitable spectrum for QUALCOMM. Nowhere is the actual monetary value of a license mentioned in the Court's decision, and at no time was it a factor for consideration in determining eligibility for a pioneer's preference or in determining an appropriate service area for preference grant.

In any event, the QUALCOMM-derived market value auction is based on a CBO auction estimate that assumes the availability of licenses nationwide. QUALCOMM fails to account for the fact that a grant of its request would *itself* affect the value of the 700 MHz licenses subject to auction. QUALCOMM has thus put the proverbial "cart before the horse" in its simplistic arithmetic calculation of the value of the 700 MHz D Block license. Specifically, grant of the request would preclude any bidder from obtaining an aggregated nationwide or regional license, or from aggregating 30 MHz of spectrum in the Southeast EAG. This obviously would significantly affect spectrum valuation and business planning for the auction and, in turn, would affect potential services which could be offered. Indeed, given the Commission's statutory deadline for completing the auction, the simple pendency of QUALCOMM's request poses uncertainty. Grant of the request shortly before the auction start date would further throw bidders' auction plans into turmoil and narrow the window of time for potential bidders to meaningfully evaluate the spectrum and derive bidding strategies.[59] Thus, if the Block D license

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[58] *See* 145 Cong. Rec. S12569 (Oct. 14, 1999).

[59] This, in turn, would undermine the Commission's obligation to "ensure that . . . an adequate period is allowed . . . after issuance of bidding rules to ensure that interested parties

(continued...)

for EAG 3 were to be awarded to QUALCOMM, the value of the remaining 700 MHz licenses could be expected to plummet. Even though, as QUALCOMM asserts, it "would not get a free license," it would obtain a significant windfall vis-a-vis other pioneer's preference winners.[60]

QUALCOMM also asserts that because of competition in the PCS markets, "[t]he years that have passed since QUALCOMM should have been awarded the Miami MTA have diminished the value of any PCS license to the point where the award of a 30 MHz block MTA could not be considered comparable to the award of the spectrum QUALCOMM originally applied for."[61] Again, QUALCOMM has no vested right to a license of a particular monetary valuation and this claim should be rejected. Further, and as previously noted, this directly contradicts QUALCOMM's advocacy in regard to the 30 MHz Phoenix BTA license and the Omnipoint 30 MHz MTA license for New York.[62]

In addition, QUALCOMM has stated it does not intend to provide traditional voice services in competition with established carriers; rather, it intends to use the 700 MHz spectrum "to introduce an exciting and innovative system for high speed wireless INTERNET access, based on its pioneering CDMA technology" comparable "to the deployment of PCS in 1995."[63] If so, then the existence of broadband PCS-cellular competition would not appear to

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[59] (...continued)
have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services." *See* 47 U.S.C. § 309(j)(3)(E)(ii).

[60] *See* Petition at 16. QUALCOMM would pay a discounted amount for the spectrum, presumably based on the formula set forth in Section 309(j)(13)(B) of the Act.

[61] Petition at 12.

[62] *See supra* notes 46-47 and accompanying text.

[63] Petition at 12.

undermine QUALCOMM's first-to-market capability for such services over 2 GHz broadband PCS frequencies -- if a license award was made with 2 GHz broadband PCS spectrum. Indeed, the Commission intended that the definition of "PCS" incorporate data-based services such as those discussed by QUALCOMM, and there is no evidence that QUALCOMM cannot provide this service on broadband PCS frequencies.[64] The Commission and QUALCOMM should look to the 2 GHz broadband PCS band to satisfy the preference award.

CONCLUSION

The Commission is statutorily precluded from granting QUALCOMM a pioneer's preference from the 700 MHz spectrum. Further, such an award would *not* comport with the Court's mandate. The relief granted to QUALCOMM must necessarily be limited to a scope

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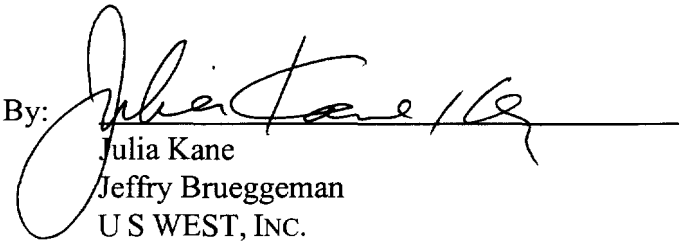
[64] *See Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4959 ¶ 3 (1994). Furthermore, QUALCOMM has provided no evidence demonstrating that an MTA service area will undermine the viability of its service. *See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, 8 FCC Rcd. 7700, 7732 ¶¶ 74-75 (1993) (discussing benefits of MTA service areas for broadband PCS). Again, an MTA-wide service area *is* commensurate with QUALCOMM's original request and the applicable broadband PCS rules.

commensurate with its original application, the pioneer's preference rules, and the broadband PCS rules. Accordingly, for the reasons discussed herein, the QUALCOMM Petition should be denied.

Respectfully submitted,

U S WEST WIRELESS, LLC

By: 

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